

## **S T I P U L A T I O N**

### **Complaint 1998 - No. 3**

The complainant in Complaint, 1998, No. 3, alleges that Representatives Karen Schmidt and Tom Huff violated RCW 42.52.180 by causing House Republican Caucus staff to prepare and mail a 107-page booklet entitled, "Addressing the Transportation Crisis" to media throughout the state. The complainant contends that the booklet was produced and mailed at public expense and promoted the passage of Referendum 49, which was voted on at the November 3, 1998, general election.

#### **FACTS**

- 1) The 1998 Legislature passed Engrossed House Bill 2894 on March 5, 1998, and submitted it to the Governor. The Governor signed the bill on April 3, 1998, and filed it with the Secretary of State on the same day. The bill, except for sections that were vetoed, and except for sections 1 through 21 and 44 through 46, became Chapter 321, Laws of 1998. Sections 1 through 21 and 44 through 46 were referred by the Legislature to the people for their adoption and ratification, or rejection at the November 3, 1998, general election. The sections referred became Referendum 49.
- 2) During the 1998 legislative session, while EHB 2894 was being considered by the Legislature numerous articles appeared in newspapers regarding transportation funding. Most articles contained statements by those who opposed EHB 2894, including the Governor, legislators and citizens, which were critical of EHB 2894, and they also contained statements by proponents of the bill which were favorable. Several other articles were written by legislators who opposed the bill. After the bill was sent to the Governor for signature, and while he was still considering it, he visited editorial boards around the state and criticized the bill. In their post-session newsletters, some Democratic legislators in reviewing the results of the 1998 Session made brief statements critical of the Republican transportation plan which had passed the Legislature.
- 3) The 107-page booklet which is the subject of this complaint was prepared by House Republican Caucus media staff, assigned to Representatives Schmidt and Huff, and with the assistance of other staff.
- 4) Representatives Schmidt and Huff reviewed the booklet in its final form and, as indicated by a signed cover letter, authorized its mailing. Institutional mechanisms were available to advise member's and the caucus staff that the content might violate the ethics law, but the booklet was not submitted to the Chief Clerk for preview, nor was advice requested from the designated House ethics adviser before the booklets were produced or

distributed. A shorter version of the booklet was produced by Caucus staff and used by Representatives Ballard, Schmidt and Huff as they visited media in Spokane, Tri-Cities, Yakima, Wenatchee and Seattle. These visits were done prior to May 7, 1998.

- 5) In a May 7, 1998, memo from Representative Ballard to House Republican Caucus members, Representative Ballard stated the purpose of the media booklet and tour was "To help ensure the media statewide have a clear understanding of our transportation proposal." The memo cautioned members not to use the booklet at town meetings or to distribute to the public, except upon request, citing the "executive rules committee" requirements.
- 6) The booklet was mailed on May 14, 1998 to approximately 400 print and broadcast media throughout the state under a cover letter signed by Representatives Schmidt and Huff. The letter states in part: "We hope this information answers any questions you may have about our budget proposals and clears up some of the misinformation that has been spread by those who oppose this plan in favor of a gas-tax increase." The cover letter also states that "The funding package will appear on the November ballot."
- 7) Pages 9 and 11 of the booklet refer to opponents' positions on the impact of the Transportation Funding Plan on education and on bonding as "The BIG lie."
- 8) Pages 2, 3, 7, 9, 10 and 11 of the booklet are written in a manner designed to persuade the reader that the "Legislative Plan" is better than the "Governor's Plan" for transportation funding and that the opponents of the "Legislative Plan" are not telling the truth.
- 9) The remaining pages of the booklet contain facts and figures regarding the legislative plan and potential projects to be funded and were taken, with little or no change, from materials prepared by staff for use during the 1998 legislative session.
- 10) The 107-page booklet cost the state \$7.61 each for postage and printing. The cost was billed to the House Republican Caucus.
- 11) The House has two policies on caucus publications and mailings. House Resolution 1998-4744 *prohibits* distribution of caucus publications to the general public whereas the House Procedures and Guidelines for Publications and Mailings *permit* caucus publications and mailings with prior approval of the Chief Clerk.

*(Emphasis Supplied)*

## **ISSUE**

The issue is whether the production and distribution of the 107-page booklet constitutes the use

of public facilities for the promotion of a ballot proposition in violation of RCW 42.52.180. In this case, the ballot proposition at issue is Referendum 49, which appeared on the November 3, 1998, general election ballot.

## DISCUSSION

What follows is a discussion of this Board's prior opinions on the subject of the use of public resources to support or oppose ballot propositions, and their relation to this case.

This Board has discussed the normal and regular conduct issue in two prior advisory opinions, 1995 - No. 18, and 1996 - No. 11. In 1995 - No. 18, this Board stated that facilities could not be used by a legislator for direct appeals to vote for or against a ballot proposition, except in the context of statements made for or against the proposition in the official voter's pamphlet produced by the state. That opinion also states that it is "normal and regular conduct" for a legislator to use state facilities to respond to inquiries from the media. Especially pertinent are the following paragraphs from 1995, No. 18, at p. 4:

The board recognizes that both the Senate and the House of Representatives have adopted very restrictive policies governing the above discussed exceptions. Generally, under these policies, legislators are given wide latitude to use office facilities to respond to questions on ballot propositions, but little leeway to use office facilities to initiate comments, especially written, on such propositions. The board believes that these policies are prudent and legally sound.

. . .

It is also normal and regular conduct to explain and analyze the legal and policy options which the legislature might consider if the ballot measure is approved by the voters. *However, presentation or distribution of such information in any manner that suggests it is intended to solicit support or opposition to a measure is improper and would be a violation.*

(Emphasis Supplied)

Lastly, with respect to Advisory Opinion 1995 - No. 18, this Board stated that state facilities could be used to prepare a guest editorial if the editorial is a factual explanation of a ballot proposition, but not if the editorial constitutes an argument for or against the proposition, either by direct appeal or by advocacy.

In Advisory Opinion 1996 - No. 11, this Board addressed similar questions in the context of press releases. The opinion arose out of an inquiry about whether it would be permissible for a legislator to issue a press release to state the legislator's position on a public policy issue if the release is in response to statements made by the Governor. The Board stated that the State Ethics Act does not prohibit such responses per se, but that each response would have to be

judged on its particular circumstances. Specifically, "A legislator may respond to issues raised and statements made by the governor, or any other state-wide elected official, unless such response is determined to be for the purpose of assisting a campaign and is not part of the normal and regular conduct of the office." In judging whether the Act has been violated, the Board stated that it would apply the following five factors: Timeliness, Proximity to Election, Relevance, Source of Initial Statement, and Tone and Tenor.

Republican Caucus media staff provided newspaper articles and legislative newsletters that they assert were the basis for generating the booklet in question. See Finding of Fact No. 2. The booklet in question in this case was distributed in mid-May. In considering timeliness in this case, it is noted that the booklet was not distributed until approximately 5-6 weeks after the last of the newspaper articles referenced as the reason for response.

The booklet was distributed on or about May 14, 1998. The legislative session ended on March 12, 1998, and Referendum 49 was filed with the Secretary of State on April 3, 1998. The election occurred on November 3, 1998. Thus, the booklet was distributed approximately 6 weeks after Referendum 49 became a ballot proposition, and approximately 5 ½ months before the election.

Advisory Opinion 1996- No. 11 requires relevancy when responses are made to press releases by the Governor. In addition to being related to legislative issues, the opinion defines relevancy as "relevant to the initial outside statement." Advisory Opinion 1996 - No. 11, at p. 5. The statements made on pages 2, 3, 7, 9, 10, and 11 do relate to the criticisms of the bill contained in the articles referred to in Finding of Fact number 2.

This Board was concerned in Advisory Opinion 1996 - No. 11 that the statements to which the press release was responding be from the governor or certain other statewide elected officials. Whether there could be responses to the published statements of citizens or other legislators was not addressed in the opinion. Many of the statements that were cited by Republican Caucus media staff as the basis for response are statements made by the governor, either while the issue was being debated in the legislature, or prior to his acting upon the bill, after it was delivered to him. Others are in response to statements made by other legislators and citizens, either during or shortly after the legislative session.

This Board also noted in its opinion that it was only addressing responsive press releases. The question of initiating a press release was not addressed, however, the opinion stated, "We believe that self-initiated press releases from legislators, using public resources, are very different from responses to outside sources and deserve a higher level of scrutiny. Finally, we remind legislators that they are always free to speak or write on any issues at any time, as long as they do not use public facilities for campaign purposes." Advisory Opinion 1996 - No. 11 at p. 6.

The Board stated in Advisory Opinion 1996 - No. 11, p. 5, that the language used in a responsive press release be only that which is necessary to adequately respond to the substance

of the initial statement and that the "tone and tenor of such debate be respectful and should not impugn the character of a legislative colleague or other elected official." The statements on pages 9 and 11 of the booklet regarding "big lies" are not respectful and do impugn the character of those who made the challenged statements.

### **Relevant Statute**

RCW 42.52.180 (1) and (2) provides as follows:

(1) No state officer or state employee may use or authorize the use of facilities of an agency, directly or indirectly, for the purpose of assisting a campaign for election of a person to an office or for the promotion of or opposition to a ballot proposition. Knowing acquiescence by a person with authority to direct, control, or influence the actions of the state officer or state employee using public resources in violation of this section constitutes a violation of this section. Facilities of an agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of state employees of the agency during working hours, vehicles, office space, publications of the agency, and clientele lists of persons served by the agency.

(2) This section shall not apply to the following activities:

(a) Action taken at an open public meeting by members of an elected legislative body to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition as long as (i) required notice of the meeting includes the title and number of the ballot proposition, and (ii) members of the legislative body or members of the public are afforded an approximately equal opportunity for the expression of an opposing view.

(b) A statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry. For the purposes of this subsection, it is not a violation of this section for an elected official to respond to an inquiry regarding a ballot proposition, to make incidental remarks concerning a ballot proposition in an official communication, or otherwise comment on a ballot proposition without an actual, measurable expenditure of public funds. The ethics boards shall adopt by rule a definition of measurable expenditure;

(c) Activities that are part of the normal and regular conduct of the office or agency; and

(d) De minimis use of public facilities by state-wide elected officials and legislators incidental to the preparation or delivery of permissible communications, including written and verbal communications initiated by them or their views on ballot propositions that foreseeably may affect a matter that falls within their constitutional or statutory responsibilities.

## CONCLUSIONS OF LAW

- The general rule, as stated in RCW 42.52.180(1) is that "public facilities" cannot be used directly or indirectly to promote the passage of a ballot proposition. The booklet in question, including its accompanying cover letter, by tone, tenor and content, promotes the passage of Referendum 49.
- RCW 42.52.180(2) sets forth four exceptions to the general rule. As exceptions, they are narrowly construed by this Board.
- RCW 42.52.180 (2)(a) applies to action taken at an open public meeting and, therefore, has no relevance to this complaint.
- RCW 42.52.180 (2)(b) also does not apply to this complaint. This exception concerns statements made in an open press conference or in response to a specific inquiry. The facts do not indicate that the booklet would fit either category.
- RCW 42.52.180(2)(c) does not apply to this complaint. It is normal and regular conduct to produce factual information concerning a referendum that the Legislature has submitted to the people for a vote. For example, the Senate Ways and Means Committee produced a pamphlet entitled "Overview of Referendum 49" which contained objective information regarding Referendum 49 and how it would be implemented, if passed. This is consistent with this Board's statement in Advisory Opinion, 1995, No. 18, at p. 4, that it is normal and regular conduct "to explain and analyze the legal and policy options which the legislature might consider if the ballot proposition is approved by the voters." However, it is not normal and regular conduct to produce and distribute information at public expense which supports a ballot proposition. As the Board said in Advisory Opinion, 1995, No. 18, at p.4, presentation or distribution of information "in any manner that suggest it is intended to solicit support or opposition to a measure is improper and would be a violation."
- RCW 42.52.180(2)(d) does not apply to this complaint. This exception refers to de minimis use of public facilities incidental to preparation of permissible communications. While the number of pages in the booklet devoted to advocacy is limited to 6 of the 107 pages, the basic thrust of the booklet is pro-Referendum 49. This Board stated in Advisory Opinion, 1995, No. 18, at p. 4 that "Because of the difficulties in determining what is a 'de minimis use' under this exception, and because of the controversy and distrust of legislators that reliance on this exception can generate, the board will narrowly construe this exception." The use of public facilities in this case was not de minimis.
- The booklet in question is also not "normal and regular conduct" as described in this Board's Advisory Opinion, 1996, No. 11. The booklet responds to various arguments made by opponents of the bill which became Referendum 49 which appeared in newspapers, but there is not evidence of a press release to which it directly responds.

Nor is it "timely" even if the newspaper articles and newsletters were considered to be in the nature of press releases. The booklet was not distributed until weeks later. As for the source of the initial statements, they came from not only the Governor but from other legislators and citizens. As cautioned in Advisory Opinion, 1996, No. 11, statements made by other than the Governor do not merit the same response. The booklet was distributed a month and a half after the Referendum qualified for the ballot. While that was well before the election, it was an official ballot proposition before the voters. Lastly, Advisory Opinion, 1996, No. 11, requires that the response be "respectful" and "not impugn the character of a legislative colleague or other elected official." The "big lie" statements are disrespectful and impugn the character of the opponents of the Referendum. Publications with language such as this used in support of ballot propositions is very different from the spirited debate sanctioned by this Board in internal publications regarding pending bills produced during the heat of the legislative session.

- The House Republican Caucus prepared the booklet and was billed for the cost. The booklet had some educative purpose and was of significant size. The fact this document was mailed to media outlets does not convert it into a press release. It is difficult to imagine a circumstance where any person would characterize over four hundred copies of a 107-page document costing the taxpayers approximately \$3,000, which was not expected to be republished verbatim, and which contained no information about media contact, as a press release.
- Even though House policies on caucus publications are in conflict, that conflict extends only to whether or not such publications are allowed as a policy matter and whether or not the Chief Clerk is responsible for their approval. The ethics law does not prohibit caucus publications per se. However, to the extent that the Representatives and staff of the House fail to take a thorough approach to ethics review, they fail each other and the public. Members and staff should discuss the applicability of the ethics law as a matter of routine.
- Neither the caucus staff nor administrative staff exhibited the degree of thoughtfulness to ethical considerations surrounding these publications as the public and the legislators have a right to expect. However, the Ethics Board will not normally excuse a violation of the ethics law because of ignorance of the law, nor refrain from penalizing members of the Legislature when their publications violate the law.
- Members are ultimately responsible for their publications. (RCW 42.52.180) Representatives Karen Schmidt and Tom Huff violated RCW 42.52.180(1) because they are responsible for the production and mailing of the 107-page booklet about which the complaint has been made. In so concluding, it must be emphasized that legislators have a right, like anyone else, to express their opinions regarding a ballot measure. However, that right does not extend to the use of public resources to produce inappropriate publications which advocate a position on a ballot measure. It is the use of public

resources in this case that constitutes the violation, not the expression of opinion.

**ORDER**

Representative Huff and Representative Schmidt violated RCW 42.52.180 by authorizing the production and mailing of these documents and are responsible for these costs in the amount of Three Thousand, Seven Hundred Twenty Four Dollars and fifty cents (450 copies x \$7.61).

The Legislative Ethics Board recommends the House of Representatives take the following action:

- a) Appoint at least one ethics adviser in accordance with Ethics Rule 1(D).
- b) Adopt and implement a meaningful policy of oversight of materials that pass through the House print shop, including camera ready print jobs.
- c) Adopt and implement a policy of specific training for all caucus public information personnel, with an emphasis of the rules and decisions of the Board related to communications.
- d) Provide notice to all Representatives that they are ultimately responsible for any violations associated with their communications.
- e) Reconcile and clarify the policies on caucus publications to meet the concerns addressed in this Stipulation.

I, Representative Tom Huff and I, Representative Karen Schmidt, hereby certify that I have read this Stipulation and Order in its entirety; that I have had the option of reviewing this agreement with legal counsel, or have actually reviewed it with legal counsel, fully understand its legal significance and consequence, agree to sign it as a resolution of this matter, and have voluntarily signed.

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Representative Tom Huff

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Date

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Representative Karen Schmidt

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Date

Having reviewed the proposed Stipulation, and on behalf of the Legislative Ethics Board, this Stipulation is accepted.

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William Asbury, Chairman

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Date